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In The Supreme Court of the United States

SHAFIQ RASUL, ET AL., *Petitioners,*
v.
GEORGE W. BUSH, ET AL., *Respondents*

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL, *Petitioners*
v.
UNITED STATES OF AMERICA, ET AL, *Respondents*

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF INTERNATIONAL LAW EXPERT IN SUPPORT OF THE PETITIONERS

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International Law Commission, Articles on Responsibilities of States for Internationally Wrongful Acts (ILC Articles). U.N.G.A. Res. No. 83, UN GAOR, 56th Sess., Supp., No. 10 and Corrigendium, U.N. Doc. A/56/83 (2001).....5

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OTHER SOURCES

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Brief *Amicus Curiae* of the Human Rights Institute of the International Bar Association 3, 6

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U.N. Human Rights Committee, General Comment No. 29 on States of Emergency (Art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).....7

INTEREST OF AMICUS CURIAE[1]

Amici represented in this brief have considerable experience and expertise in international human rights law. They include members of the Bar of the United States Supreme Court with experience in cases involving international law, a senior professor of international law, and a legal representative of the prisoners in Guantánamo Bay, Cuba in a case before the Inter-American Commission on Human Rights. All *Amici* have demonstrated interests in ensuring respect for international law.

The ruling of the United States Court of Appeals for the District of Columbia that is challenged in this case concerns the basic human rights of the prisoners in Guantánamo Bay Naval Base in Cuba. The Court's decision on this Petition for a Writ of Certiorari will affect the basic human rights of both those persons named in the Petition before the Court as well as those who are not, but who are in the same intolerable conditions.

[1] In accordance with Rule 37.6 it is stated that no monetary contributions were made for the preparation or submission of this brief and that no counsel for any party to this case participated in the authoring of this brief.

SUMMARY OF ARGUMENTS

The Court should find that the United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay Naval Base in Cuba.

The United States courts have a duty to exercise jurisdiction over cases in which foreign nationals who have been captured abroad in connection with hostilities are detained by United States military forces when those persons claim that their internationally protected human rights have been violated.

This duty is a consequence of the United States' obligation to provide any person who reasonably claims that his or her internationally protected human rights have been violated access to a court to determine the validity of the claim.

This duty is based on treaties that the United States has ratified and is part of customary international law that creates legal obligations for the United States.

Violation of this duty provides all other states a justification for actions taken against the United States in response to its violation of international law.

INTRODUCTION

This *Amicus* Brief presents arguments based on international law. This law is relevant to the Court because the United States government has unequivocally represented that it will abide by it and this Court has long held that "[i]nternational law to be part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquette Habana and The Lola*, 175 U.S. 667, 700 (1900).

This *Amicus* Brief takes into account the Brief *Amicus Curiae* of the Human Rights Institute of the International Bar Association (hereinafter *Amicus Curiae* Brief of the IBA) in Support of Petitioners. The *Amicus Curiae* Brief of the IBA focuses on the issue of attribution of state responsibility under international law and rights to fair trial and not to be subject to arbitrary arrest and detention. This *Amicus* Brief focuses on the more general right to access to a court when international human rights law is violated and the consequences that may follow such a violation.

Although Amicus Curiae believe that Petitioners' claims, raised in their initial petition for *habeas corpus* are meritorious, this brief does not comment on the substantive claims. To invoke the basic rights considered herein it is only necessary for Petitioners to raise an arguable claim, which it is clear they have done.

In accordance with the Rules of the Court, this *Amicus* Brief does not repeat the arguments in the *Amicus Curiae* Brief of the IBA, but rather develops upon them and provides the Court new arguments that are of crucial relevance to the determination of this matter. We thus consider this *Amicus*

Brief to assist the Court in understanding the international responsibility of the United States that requires the United States courts to take jurisdiction in this case.

ARGUMENTS

I. THE UNITED STATES COURTS HAVE A DUTY TO EXERCISE JURISDICTION OVER CASES IN WHICH FOREIGN NATIONALS WHO HAVE BEEN CAPTURED ABROAD IN CONNECTION WITH HOSTILITIES ARE DETAINED BY THE UNITED STATES AND CLAIM THAT THEIR INTERNATIONALLY PROTECTED HUMAN RIGHTS HAVE BEEN VIOLATED

The duties of states are derived from the concept of state responsibility. As a highly qualified international legal publicist has recently pointed out, state responsibility for violations of international law is a general principle of international law. Ian Brownlie, *Principles of International Law* 420 (6th ed. 2003).

Generally where no state responsibility exists, a state need not act in a particular manner and has discretion as to its international actions because it is a sovereign entity. However, when, by virtue of treaty or custom, an international obligation exists limiting the remit of state action, that state is legally bound to act within the constraints of international law.

The international law of state responsibility has developed over hundreds of years. Although it is not fully codified, the work of the United Nation's International Law Commission (ILC) has been of great value in establishing its consensually accepted parameters. These articles reflect the consensus of many of the leading international lawyers who

have been brought together to study, develop, and prepare for codification the rules of international law. The United States has participated in these deliberations and is currently represented Mr. Michael J. Matheson on the International Law Commission.

In 2001 the International Law Commission adopted the Articles on Responsibilities of States for Internationally Wrongful Acts (ILC Articles). U.N.G.A. Res. No. 83, UN GAOR, 56th Sess., Supp., No. 10 and Corrigendium, U.N. Doc. A/56/83 (2001). These articles reflect the basic rules concerning state responsibility that have been agreed by the consensus of the international community's leading legal experts.

The foremost principle agreed to by the International Law Commission is that reflected in article 1 of the ILC Articles, namely: "Every internationally wrongful act of a State entails the international responsibility of that State."

Article 2 of the ILC Articles further states that to establish the existence of an internationally wrongful act it is necessary to identify an act that is attributable to a state and a corresponding obligation that is violated by the act. *Id.* at art. 2.

* * *

In this case there can be no doubt that the act complained of—denying Petitioners access to a court to determine the legality of their detention—has been committed by an organ of the government of the United States. The United States courts have denied Petitioners this access.

That national courts can act in a manner that incurs the responsibility of a state is a well accepted principle of international law and has been reiterated by the International Court of Justice in *Difference Relating to Immunity from*

Legal Process of a Special Rapporteur of the Commission on Human Rights, *I.C.J. Reports* 62 (1999), at p. 87, para. 62, where a national court's allowance of an action against a United Nations representative with immunity under international law was found to be a violation of international law. The act of denying Petitioners access to a court of law is therefore clearly attributable to the United States.

The legal obligation to ensure Petitioners access to a court of law to determine the legality of their arrest is equally an entrenched principle of both treaty and customary international law that is binding on the United States. The specific contours of this legal obligation are identified in sub-sections A and B, below. It is important to reiterate at this point, however, that the legal constraints on a states' action may derive from either treaties or customary international law. A violation of either type of obligation gives rise to the international responsibility of the state.

Finally, as the *Amicus Curiae* Brief of the IBA has indicated, state responsibility for violation of basic human rights attaches to actions perpetrated by actors under the control or acting on behalf of the United States and is without prejudice to the location, legal status, nationality, race, religion, ethnic background, or any other similar feature of the victim of a violation. (*Amicus Curiae* Brief of the IBA at 14; *also see In the Matter of the Detainees in Guantánamo Bay, Cuba*, "Response to a Request for Precautionary Measures," Inter-Am.C.H.R. (March 13, 2002) in which the Commission decided concerning the rights of the same Petitioners now before this Court that "[t]he determination of a state's responsibility for violations of the international human rights of a particular individual turns not on that individual's nationality or presence within a particular geographic area, but rather on whether, under

the specific circumstances, that person fell within the state's authority and control"). *Id.*

A. THE DUTY TO EXERCISE JURISDICTION IS BASED ON TREATIES THAT THE UNITED STATES HAS RATIFIED

Article 2, paragraph 3 of the International Covenant of Civil and Political Rights (ICCPR), U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, requires that the United States provide any person claiming that their human rights have been violated an effective remedy. Failure to afford such access to a court of law to challenge one's detention constitutes a violation of the international obligation in article 2, paragraph 3 of the ICCPR as well as a violation of due process rights. This treaty has been ratified by the United States.

Elaborating upon the state's responsibility for ensuring the human rights in the ICCPR in times of the gravest emergency, the United Nations Human Rights Committee has stated "that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency." UN Human Rights Committee, General Comment No. 29 on States of Emergency (Art. 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 16. This respect requires not only that the rights of due process be protected, but also that "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished." *Id.*

When a state party to the ICCPR has denied an individual access to a court to determine whether or not his or her human rights have been violated the Human Rights Committee has held that this constitutes a violation of the

article 2, paragraph 3. *See, for example, Currie v. Jamaica*, Communication No. 377/1989, U.N. Doc. CCPR/C/50/D/377/1989 (1994) at para. 13.3 and 13.4 (expressing the view that the absence of legal aid is a bar to effective access to a court that violates article 2, paragraph 3) and *Luyeye v. Zaire*, 38th Sess. U.N. Doc. A/38/40, p. 187, annex XIX, REPORT OF THE HUMAN RIGHTS COMMITTEE, GAOR, 43rd Sess., Supp. No. 40, U.N. Doc. A/43/40, Annex VII.C (expressing the view that article 2, paragraph 3 is violated when a person is held for nine months during a state of emergency and denied access to the courts, even if he can communicate an appeal to the executive authorities).

The ICCPR does contain an express provision in article 4 that allows states to derogate from the articles concerning access sot a court and fair trial in cases of emergency. Such derogations, however, must be expressly invoked and are invalid unless the strict criteria in article 4 have been followed. The United States took no steps to invoke article 4 and did not derogate from these provisions.

The United States is also member of the Organization of American States (OAS) by virtue of its ratification the Charter of the Organization of American States, OAS Treaty Series, Nos. 1-C and 61, U.N.T.S., No. 1609, Vol. 119, *entered into force* 30 April 1948. As an OAS member state, the United States must respect the basic human rights of all persons under its jurisdiction. *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-American Court, Advisory Opinion No. OC-10/89 (14 July 1989) at paras. 43-46 and *James Terry Roach and Jay Pinkerton v. United States*, Inter-American Commission on Human Rights, Case No. 9647 (22 June 1977) at paras. 46-49.

The human rights that must be respected in the Inter-American system are determined by the organs of the OAS, but the duty to respect these rights is based on the Charter of the OAS. This relationship has been succinctly described by the Inter-American Court in the case concerning *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989) (14 July 1989) at paras. 39-43:

> 39. The Charter of the Organization refers to the fundamental rights of man in its Preamble ((paragraph three) and in Arts. 3(j), 16, 43, 47, 51, 112 and 150; Preamble (paragraph four), Arts. 3(k), 16, 44, 48, 52, 111 and 150 of the Charter revised by the Protocol of Cartagena de Indias), but it does not list or define them. The member states of the Organization have, through its diverse organs, given specificity to the human rights mentioned in the Charter and to which the Declaration refers.
>
> 40. This is the case of Article 112 of the Charter (Art. 111 of the Charter as amended by the Protocol of Cartagena de Indias) which reads as follows:
>
> > There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.
> >
> > An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.
>
> Article 150 of the Charter provides as follows:
>
> > Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the

Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission's Statute, which was approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979. That Article reads as follows:

> 1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
>
> 2. For the purposes of the present Statute, human rights are understood to be:
>
> a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
>
> b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Articles 18, 19 and 20 of the Statute enumerate these functions.

> 42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. For example, in Resolution 314 (VII-O/77) of June 22, 1977, it charged the Inter-American Commission with the preparation of a study to "set forth their obligation to

> carry out the commitments assumed in the American Declaration of the Rights and Duties of Man." In Resolution 371 (VIII-O/78) of July 1, 1978, the General Assembly reaffirmed "its commitment to promote the observance of the American Declaration of the Rights and Duties of Man," and in Resolution 370 (VIII-O/78) of July 1, 1978, it referred to the "international commitments" of a member state of the Organization to respect the rights of man "recognized in the American Declaration of the Rights and Duties of Man."....

43. Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

The Inter-American Commission has held that the right to access to a court in article XVIII reflected in the American Declaration of the Rights and Duties of Man was violated when the United States interdicted Haitian refugees and held them in the Guantánamo Bay Naval Base in Cuba denying them access to the United States courts. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1996) at para. 180. *Also see Palacios v. Argentina*, Case 10.194, Inter-Am.C.H.R., OEA/Ser.L/V/II.106 Doc. 3 rev. (2000) at paras. 56-58.

The Inter-American Court has also repeatedly held that the responsibilities incumbent upon states of the OAS include the duty not to suspend judicial guarantees, such as

habeas corpus and other guarantees of access to courts. *See Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8 (30 January 1987) and *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser. A) No. 9 (6 October 1987). These guarantees may never be suspended even temporarily because they are essential to the protection of other human rights, including human rights such a prohibition of torture that has the non-derogable character of *jus cogens*. *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8 (30 January 1987) at para. 27.

The interpretation of the Charter of the OAS by the authoritative bodies of the Inter-American Commission on Human Rights and Inter-American Court of Human Rights clearly indicate that the Charter of the OAS includes a legal obligation providing all persons under the authority of the United States with the right of access to the United States courts. Therefore, the failure of the United States courts to respect this right constitutes an internationally wrongful act giving rise to state responsibility.

* * *

Furthermore, the United States has signed, although it has not ratified, the American Convention on Human Right, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978. In doing so, it has undertaken not to act in any way that would defeat the object and purpose of the American Convention. By denying Petitioners the right to be heard by a United States court in matters concerning alleged violations of their most basic human rights, the United States subjects the object and purpose of the American Convention on Human Rights to the complete discretion of the United States government and thereby renders its ineffective as an international legal instrument. Again, therefore, the failure

of the United States courts to provide Petitioners a remedy constitutes an internationally wrongful act giving rise to state responsibility.

B. THIS DUTY IS PART OF CUSTOMARY INTERNATIONAL LAW

The obligation to provide individual access to courts of law to determine the legality of their detention has authoritatively been found to be a principle of customary international law.

Customary international law is formed when states act in a certain manner with the expectation that they have a legal obligation to do so. Once the state practice and *opinio juris* necessary to form customary international law have formed, a state's failure to fulfill an obligation so formed is a violation of international law.

A valuable reflection of both state practice and *opinio juris* is the ratification of treaties containing the obligation alleged to be customary international law. Such ratifications indicate that the concerned states acknowledge a given rule as a legal obligation.

The right to access to a court is customary international law because the overwhelming majority of the international community has agreed to declarations or ratified treaties recognizing this right and numerous international tribunals have held this legal obligation to be part of customary international law. The United States has often been among those who have supported this right.

Foremost among the expressions of this right is the Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), that was adopted without a vote against it and which recognizes "the right to

an effective remedy by the competent national tribunals for acts violating the fundamental rights granted." Art. 8.

This right is also found in article XVIII of the American Declaration on the Rights and Duties of Man. The United States government has admitted that although "[t]his Article does not require the courts to reach a certain outcome with respect to the alleged denial of legal rights ... Article XVIII is addressed to ensuring that there is a procedure available to ensure respect for legal rights." Representations of the United States government to the Inter-American Commission *restated in The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OAS. Doc. OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1996) at para. 110.

The right of access to a Court is also recognized in the other two instruments that make up the International Bill of Human Rights the International Covenant of Civil and Political Rights which has been ratified by 151 states, including the United States, and the International Covenant of Economic Social, and Cultural Rights that has been ratified by 148 states. In total, these two treaties have acquired 299 ratifications. Office of the United Nations High Commissioner for Human Rights, *Status of the Ratification of the Principle International Human Rights Treaties*, as of 2 November 2003 at p. 12.

Article 2, paragraph 3 of the ICCPR as indicated above in section A has been held to be violated when a defendant is prevented from accessing the courts to review his detention. *See Currie v. Jamaica* and *Luyeye v. Zaire*, *supra* 8.

Equally, article 2, paragraph 1 of the International Covenant on Economic, Social and Cultural Rights, U.N.G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 January 1976 has been authoritatively interpreted by the Committee on Economic, Social and Cultural Rights to provide the right of access to a court. UN Committee on Economic, Social and Cultural Rights Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties obligations (Art. 2, para. 1 of the Covenant) (Fifth session, 1990) *reprinted in* United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 45 (1994) at para. 5.

The protection of these rights for foreign nationals is of particular pertinence. The American Law Institute acknowledged this stating that "[a] state's responsibility to individuals for foreign nationality under customary international law included the obligation to respect civil and political rights articulated in the principle international human rights instruments—the Universal Declaration and the International Covenant of Civil and Political Rights—as human rights generally...." American Law Institute, *Restatement (Third) of the Foreign Relations law of the United States* §711 (1987) at cmt. c., p. 186. Moreover, according to the American Law Institute, while "[c]ustomary law also holds a state responsible for a "consistent pattern of gross violations" of human rights of any persons subject to its jurisdiction" ... "[a]s regards foreign nationals, however, a state is responsible even for a single violation of many of the civil and political rights proclaimed in the Universal Declaration." *Id.*

The right of access to a court is also found in article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* 26 June 1987 that is ratified by 133 states including the United States; article 6 of the

International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force* 4 January 1969 that is ratified by 169 states including the United States; as well as article 7 of the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986 that is ratified by 53 states; article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222, *entered into force* 3 September 1953 that is ratified by 44 states; and the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* 18 July 1978 that is ratified by 25 states.

As indicated above in section A, both the Inter-American Commission and Court have also found the right to have access to a court to determine violations of international human rights law is binding on OAS member states whether or not they have ratified the American Convention on Human Rights. The Inter-American Commission has also found that this right was violated when individuals were held in Guantánamo Bay Naval Base in Cuba by American authorities and without access to the United States courts. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1996) at para. 180.

The right of access to a court for the determination of allegation involving human rights has also been recognized in the constitutions and practices of numerous states.

Every one of forty-five the European states members of the Council of Europe guarantee both nationals and foreigners access to their courts when an individual claim his human rights have been violated by the respective government. When this guarantee is not met in practice the individual may have access to the European Court of

Human Rights. This Court has unambiguously held that every individual has an affirmative right of access to a court to protect his human rights. *Golder v. UK*, Eur.Ct.H.R., Ser. A, No. 18 (1975) at paras. 56-58.

Every one of the 54 constitutions in Africa guarantee the right of access to a court and in practice when this right has not been respected African states have been held to have violated international human rights law. When, for example, the government of Sudan failed to provide twenty-six defendants with access to an independent and impartial tribunal, the African Commission of Human and Peoples' Rights and the United States claimed that the government was in violation of its human rights obligations. This was not withstanding the fact that article 34 of the Sudanese Constitution provides for a right of access to a court of law and the fact that the government had brought the defendants before a military tribunals claming that they had committed serious acts of violence against the state. *Law Office of Ghazi Suleiman v. Sudan*, Comms. 222/98 and 229/99, *Decisions on Communications Brought Before the African Commission, Decisions adopted at the 33rd Ordinary Session held in Naimey, Niger* (May 2003) at p. 3 (the Commission also found the rights to fair trial to form obligations *erga omnes* on states).

The authoritative decisions of international human rights bodies, the multitude of treaties agreed to by states, including the United States, and the state practice reflected by the adoption and adherence to these treaties, combine to express an overwhelming *opinio juris* evidencing that the right of access to a court has become customary international law.

This right is violated when the United States courts refuse to take jurisdiction over claims by Petitioners that their human rights have been violated. In violating this

right, the United States puts itself among the states that least respect the international rule of law and its actions give rise to state responsibility.

II. THE UNITED STATES FAILURE TO RESPECT THIS DUTY PROVIDES OTHER STATES A JUSTIFICATION FOR ACTIONS AGAINST THE UNITED STATES

A state that is responsible for an internationally wrongful act is under an obligation to cease the act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition. Malcolm N. Shaw, *International Law* 714 (5th ed. 2003). *Also see, supra* at p. 5, article 30 of the ILC Articles.

Furthermore, in the *LaGrande Case*, the International Court of Justice held that a mere apology is an insufficient remedy and that an injured person must have access to a judicial remedy in which his or her basic human rights can be determined. *Germany v. United States*, I.C.J. Reports, No 104 (27 June 2001) at para. 125.

In addition, an internationally wrongful act by a state gives rise to a right of other states to take countermeasures. The International Court has accepted that countermeasures can justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and directed against that State." *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports* 7 (1997) at p. 55, para. 83.

Because of the fundamental nature of the right of access to a court, *see Golder*, *supra* at 14, para. 35 (recognizing that other due process rights are "of no value at all if there are no judicial proceedings"), it must be considered as an obligation *erga omnes*, thereby creating an interest in ensuring its respect for all states in the international community.

Should any state or international organization seek to take action against the United States because of its courts failure to exercise jurisdiction over the prisoners in Guantánamo Bay Naval Base the actions may be legally justified by the United States violation off the law. Such actions taken against the United States may indirectly threaten the security and well-being of the country, for example, if they include the failure off other states to cooperate with the United States on criminal matters.

Where, as in this case, the violation involves an obligation *erga omnes* the right to seek redress accrues to all the states of the international community. This intensifies the dangerous consequences that may follow from the United States' failure to respect international law.

Finally, violation of international law by the United States government plays into the hands of non-state actors seeking to justify their use of force against the United States. These actors an—and do—claim that because the United States government does not respect international law, neither will they.

CONCLUSION

For the abovestated reasons, the Court should find that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay Naval Base, Cuba when violations of these individuals' human rights are alleged.

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